

**TOM LANTOS HUMAN RIGHT COMISSION
United States Congress**

Judicial Independence in Central America

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June 9, 2021

I am presenting this testimony as Director of CEJIL's Program for Central America and Mexico. CEJIL is an organization that works to reduce inequality, discrimination and violence by strengthening democracies, protecting and promoting human rights and combating impunity in the region; it specializes in strategic litigation.

I also provide this testimony as an expert in justice in Central America. I was the first female Attorney General of Guatemala. During my tenure, the former head of state Efraín Ríos Montt was prosecuted for the crime of genocide; drug trafficking, homicides and gender violence were also combatted. In 2015 I formed part of the Interdisciplinary Group of Independent Experts (GIEI) for the Ayotzinapa case (Mexico), and in 2018 I formed part of the Interdisciplinary Group of Independent Experts (GIEI) for Nicaragua, both under the auspices of the Inter-American Commission on Human Rights (IACHR).

Central America faces enormous threats to judicial independence. The capture of justice is one of the main strategies of powerful groups to weaken democratic systems and the rule of law, ensuring impunity for corruption and human rights violations and bringing us ever closer to an authoritarianism from which it will be difficult to return.

Corruption versus the enjoyment of human rights and judicial independence

Corruption, as a phenomenon that generates mechanisms to displace the public interest for private interests, has multidimensional effects and serious impacts on the democratic institutions of the rule of law and, therefore, on the exercise and enjoyment of human rights of all people.

Among others, corruption impacts citizens' trust in public institutions, affects the legitimacy of those who govern, allows the strengthening of organized crime and damages the public treasury. All this represents not only setbacks for the rule of law, but also hinders the full enjoyment of the rights of individuals, with a differentiated impact on historically excluded communities.

In this sense, the Inter-American Commission on Human Rights (IACHR) has pointed out that: *"Corruption has a direct impact on the satisfaction of the obligation of States to allocate the maximum of their available resources in the area of human rights, particularly to guarantee the enjoyment and exercise of ESCER [economic, social, cultural, and environmental rights]. In*

particular, corruption affects people living in poverty because, due to their vulnerability, they suffer the consequences of the phenomenon in an aggravated manner".¹

Corruption, in countries with high levels of inequality and poverty, is also one of the structural causes of migration. Corruption denies access to health, education and security to thousands of people; it takes away hopes of a dignified future for Central Americans.

Among the most significant impacts of the phenomenon of corruption in the region, the IACHR has highlighted the impact on the systems of administration of justice and the principle of judicial independence. In this sense, it has pointed out that *"...the administration of justice itself can be subject to acts of corruption, thus affecting its necessary independence; and at the same time it can become an agent of corruption, such that the proper administration of justice is affected. It is for this reason that the effective implementation of due process guarantees constitutes a safeguard to prevent and control judicial corruption, limiting the spaces of discretion and ensuring forms of control".²*

As will be detailed below, there is also much concern about the situation of people who are at risk as a result of their work in the fight against corruption, as they suffer threats and violence for their investigations and denunciations of corruption.

The phenomenon identified as "co-optation of the Judiciary" can be considered in itself a form of corruption, since it seeks a situation in which private actors with power manage to influence the decision-making of State officials, in this case of the justice system, obtaining benefits in exchange and generating a relationship of dependence with those interests.

Examples from the whole region the increase in strategies for the co-optation of justice systems.

Recently in **El Salvador**, the new Legislative Assembly, controlled by President Nayib Bukele's party, removed five judges of the Constitutional Chamber and the Attorney General in an irregular process, illegally naming their replacements and violating the essential principle of separation of powers. The actions of the Assembly, according to the injunction of unconstitutionality 01-2021 issued by the judges of the Constitutional Chamber during the removal process, transgressed the constitutional mandates of the Salvadoran system of government. This order was disregarded by the Executive and Legislative Branches.³

The United Nations General Secretariat⁴, the Office of the High Commissioner for Human Rights (OHCHR)⁵, the Inter-American Commission on Human Rights (IACHR)⁶, the United

¹ Inter-American Commission on Human Rights (IACHR). *Report on Corruption and Human Rights*. December 2019. P. 13. Available at: <http://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>

² Ibid., p. 12.

³ Inter-American Commission on Human Rights (IACHR). *The IACHR condemns the removal of the judges of the Constitutional Chamber of the Supreme Court of Justice without respect for due process and urges El Salvador to preserve the rule of law*, May 3, 2021. Available at: http://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/110.asp; El Faro. *Bukele's Legislative Assembly Ousts Supreme Court Magistrates and Attorney General*. May 2, 2021. Available at: https://elfaro.net/en/202105/el_salvador/25452/New-Legislative-Assembly-Ousts-Supreme-Court-Magistrates-and-Attorney-General.htm

⁴ <https://www.un.org/sg/en/content/highlight/2021-05-03.html>

⁵ <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=27053&LangID=S>

⁶ <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2021/110.asp>

Nations Special Rapporteur on the independence of judges and lawyers⁷, the European Union⁸, the governments of Spain⁹, Norway¹⁰, Canada¹¹ and the United States¹², among others, have made statements regarding these proceedings.

In **Honduras**, a similarly serious situation happened in 2012¹³, when the Legislative Assembly removed four judges from the Constitutional Tribunal and named a new Court which, violating the express text of the Constitution, permitted the 2018 reelection of Juan Orlando Hernández, in elections that the OAS called fraudulent.¹⁴

In **Guatemala**, the cooptation of the Constitutional Court¹⁵ was consolidated this April with the confirmation of several judges close to the Executive branch or with party affiliation, and arbitrarily preventing the swearing in of the only independent elected judge, Gloria Porras, who due to criminalization and threats had to leave the country. The strategy to attack the work of independent judges has been to promote the opening of proceedings to remove the immunity they enjoy (preliminary trials), despite the fact that Guatemalan legislation states that magistrates "may not be prosecuted for opinions expressed in the exercise of their office."¹⁶

The election and renewal period for all high positions of the Supreme Court of Justice and the Courts of Appeals began in 2019; however, members of the Congress of the Republic and politicians accused of corruption took control of this electoral process to appoint judges loyal to their interests, and thus guarantee for corruption networks and organized crime.¹⁷

In **Nicaragua**, following successive legislative reforms, the president has been reelected three times and in practice, it operates as a one-party state. This concentration of power is clear in the appointment of judges influenced by the governing party, which has a majority that permits it to appoint judges without support from other political parties in the National Assembly. This has led to the disappearance of judicial independence in that country.¹⁸

⁷ <http://www.oacnudh.org/el-salvador-experto-de-la-onu-condena-la-destitucion-de-principales-magistrados-y-del-fiscal-general/>

⁸ <https://twitter.com/JosepBorrellF/status/1389135862169018370?s=19>

⁹ <https://twitter.com/AranchaGlezLaya/status/1389261710314418182?s=19>

¹⁰ <https://twitter.com/rutgiverin/status/1389562033692106752?s=19>

¹¹ <https://twitter.com/embcansv/status/1389299460585426948>

¹² <https://foreignaffairs.house.gov/2021/5/bipartisan-resolution-urging-salvadoran-government-to-respect-democratic-institutions-passes-the-house-foreign-affairs-committee>

¹³ El Universo. *Congreso de Honduras destituye magistrados del poder judicial*. December 12, 2012. Available at: <https://www.eluniverso.com/2012/12/12/1/1361/congreso-honduras-destituye-magistrados-poder-judicial.html/>

¹⁴ OHCHR. Special Rapporteur on the independence of judges and lawyers. *Grave atentado a la democracia en Honduras la destitución de magistrados de la Sala Constitucional*. January 2013. Available at: <https://newsarchive.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S>

¹⁵ Inter-American Commission on Human Rights (IACHR). *IACHR Urges Guatemala to Guarantee Transparency and Compliance with International Standards in the Selection Process for the Constitutional Court*. February 11, 2021. Available at: <http://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2021/031.asp>

¹⁶ Inter-American Commission on Human Rights (IACHR). *IACHR Expresses Concern Over Impeachment Proceedings Brought Against Members of Guatemala's Constitutional Court*. March 18, 2021. Available at: http://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/065.asp

¹⁷ CEJIL et al. *Guatemala debe enmendar el proceso de elección de Cortes*. February 24, 2020. Available at: <https://cejil.org/comunicado-de-prensa/guatemala-debe-enmendar-el-proceso-de-eleccion-de-cortes/>

¹⁸ CEJIL et al. *Organizaciones denuncian instrumentalización del sistema de justicia de Nicaragua para la criminalización y la impunidad*. November 11, 2019. Available at: <https://cejil.org/comunicado-de-prensa/organizaciones-denuncian-instrumentalizacion-del-sistema-de-justicia-de-nicaragua-para-la-criminalizacion-y-la-impunidad/>

Equally worrying is the **lack of independence of attorney generals' offices** in the region. In **Honduras**, the attorney general was appointed without a selection process¹⁹. In **El Salvador**, the recently appointed attorney general unilaterally ended the International Commission Against Impunity-CICIES²⁰. In **Nicaragua**, the attorney general works directly under President Ortega and in Guatemala, the attorney general has permitted the office to be used to persecute and criminalize human rights defenders, the independent press and civil servants in the justice system.²¹

Effects of the subjugation of the justice system: impunity and criminalization

Two of the most serious impacts of the submission of the judicial branch are **impunity** for abuses of power, for grave human rights violations and major corruption cases, and the **criminalization** of people who fight against it.

One clear example of **impunity** is what followed the serious violations and state repression of protests in **Nicaragua** after April 2018²². In **El Salvador**, a retroactive law was adopted to ensure immunity for irregularities in purchases of medical treatments for COVID-19²³. In **Guatemala**, the investigation and prosecution of major corruption cases is at risk. It was precisely the revelation of the use of illicit campaign financing, with which the economic elites bribed political parties, that triggered the backsliding of incipient efforts to strengthen judicial independence.²⁴

The cooptation of justice also ensures the **use of the legal system to criminalize** those who challenge power. In **Nicaragua**, the 122 people still detained for political reasons are an example of the instrumentalization of the judicial branch to violate human rights. The arrests of four presidential pre-candidates for the elections scheduled for November 2021, Cristiana Chamorro, Arturo Cruz, Felix Maradiaga and Juan Sebastian Chamorro, as well as at least six other opposition leaders, demonstrate that the judiciary plays a key role in the political repression in the country to prevent the peaceful transfer of power and free elections.²⁵

Criminalization and attacks against human rights defenders is a pattern in a region characterized by high rates of impunity. In **Honduras**, so far in 2021, the wave of legal proceedings against human rights defenders, especially environmental and territorial

¹⁹ DW. *Centroamerica: El poder judicial es el principal campo de batalla en la cooptación del Estado*. May 10, 2021. Available at: <https://www.dw.com/es/centroam%C3%A9rica-el-poder-judicial-es-el-principal-campo-de-batalla-en-la-cooptaci%C3%B3n-del-estado/a-57487442>

²⁰ El Faro. *Bukele sepulta su principal promesa de campaña, la Cicés*. June 5, 2021. Available at: https://elfaro.net/es/202106/el_salvador/25526/Bukele-sepulta-su-principal-promesa-de-campa%C3%B1a-la-Cic%C3%ADes.htm

²¹ Grupo Interdisciplinario de Expertos Independientes (GIEI) Nicaragua. *Report on the violent events that took place in Nicaragua between April 18th and May 30th*. December 2018. Available at: https://gieinicaragua.org/giei-content/uploads/2019/01/GIEI_NICARAGUA_EXECUTIVE_SUMMARY_eng.pdf.

²² Ibid.

²³ El Faro. *Asamblea otorga inmunidad a funcionarios de Bukele por compras durante la pandemia*. May 5, 2021. Available at: https://elfaro.net/es/202105/el_salvador/25462/Asamblea-otorga-inmunidad-a-funcionarios-de-Bukele-por-compras-durante-la-pandemia.htm

²⁴ Inter-American Commission on Human Rights (IACHR). *IACHR Expresses its Concern over Guatemala's Decision to not Renew the Mandate of the International Commission against Impunity in Guatemala (CICIG)*. September 4, 2018. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/196.asp

²⁵ IACHR and OHCHR. *La CIDH y la OACNUDH condenan categóricamente la persecución penal en contra de precandidatos y precandidatas presidenciales e instan al Estado de Nicaragua a su inmediata liberación*. June 9, 2021. Available at: <http://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2021/145.asp>

defenders, continues as a method of criminalization for opponents of extractive projects imposed on the communities, particularly Lenca and Garifuna people.²⁶

Through monitoring, the Association for Democracy and Human Rights (ASOPODEHU) has registered about 38 active criminal proceedings so far this year against defenders of territory and environment. They are accused of various crimes, but the goal is to stop their work in defense of human rights.²⁷ In particular, the defenders of the lands and territory of the Guapinol River have been arbitrarily detained for 21 months.²⁸

Currently, after months of unjustified delays, the trial against David Castillo, co-perpetrator of the crime committed against leader Berta Cáceres, is underway. In these proceedings, it is particularly important to guarantee the judicial independence of the judges who are hearing the case.²⁹

In **El Salvador**, the principal target of criminalization has been the independent press; the spurious criminal proceedings against the media organization El Faro represent clear attacks on freedom of expression.³⁰

On June 8, the Minister of Public Security, Gustavo Villatoro, during a radio interview, said that "many journalists" in El Salvador were being "followed"³¹. The official's statements, and continuing statements by the government, have been questioned by national and international organizations, as well as by journalists, who have urged the government and its officials to respect freedom of the press and those who practice the profession.³²

In **Guatemala**, in addition to the criminalization of human rights defenders and journalists³³, civil servants in the justice system are also criminalized, as a strategy to punish and intimidate those who fight against impunity in cases of serious human rights violations and corruption. The pattern of criminalization consists of the Public Prosecutor's Office opening unfounded criminal complaints and keeping them open indefinitely. These actions are accompanied by intense smear and stigmatization campaigns on social networks, in the media, and often in the discourse of public officials, to generate the image that they are dangerous, criminal and enemies. In recent years it has been used especially against magistrates of the Constitutional

²⁶ Pasos de Pie Grande. Monitoreo de compromisos internacionales. Hay 38 procesos judiciales activos en 2021 contra defensores ambientales y territoriales en Honduras. June 16, 2021. Available at: <https://www.pasosdeanimalgrande.com/es-co/monitoreo/item/3185-hay-38-procesos-judiciales-activos-en-2021-contra-defensores-ambientales-y-territoriales-en-honduras>

²⁷ Ibid.

²⁸ ACAFREMIN. *Informe 2020: Guapinol Resiste. Orígenes del conflicto en el Bajo Aguán Honduras*. September 13, 2020. Available at: https://www.acafremin.org/images/documentos/Guapinol_ESP_Baja_Res.pdf

²⁹ COPINH. *Justicia para Berta. Resumen diario: Juicio contra David Castillo*. June 17, 2021. Available at: <https://copinh.org/2021/06/juicio-contra-david-castillo-dia-40/>

³⁰ BBC News. *Bukele vs El Faro: qué hay detrás del enfrentamiento del popular presidente de El Salvador con uno de los medios más prestigiosos del continente*. October 5 2020. Available at: <https://www.bbc.com/mundo/noticias-america-latina-54408910>

³¹ Aquí Colombia. *El gobierno salvadoreño hace seguimiento de periodistas y lo justifica como tema de seguridad*. June 8 2021. Available at: <https://www.columbia.co.cr/noticias/internacionales/31869-el-gobierno-salvadorenio-hace-seguimiento-de-periodistas-y-lo-justifica-como-tema-de-seguridad>

³² El Faro. *Periodistas e intelectuales de 47 países condenan ataques al periodismo independiente en El Salvador*. September 30, 2020. Available at: https://elfaro.net/es/202009/el_salvador/24868/Periodistas-e-intelectuales-de-47-paises-condenan-ataques-al-periodismo-independiente-en-El-Salvador.htm?st-full_text=all&tpl=11

³³ Inter-American Commission on Human Rights (IACHR). *The IACHR Condemns Murders and Attacks Against Defenders in Guatemala*. September 11 2020. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2020/215.asp.

Court, judges of high-risk courts that hear major corruption cases or cases of serious human rights violations³⁴, former CICIG officials and prosecutors of the Human Rights Prosecutor's Office and the Special Prosecutor's Office against Impunity (FECI).³⁵

Recently, on May 19, 2021, a former CICIG analyst, Aníbal Arguello, who has worked on relevant investigations - such as the “La Línea” case against former President Otto Pérez Molina - was arrested along with the former head of the Superintendence of Tax Administration (SAT), Juan Francisco Solorzano Foppa. These individuals remained in pre-trial detention, putting them at high risk for having investigated many of the people currently in pre-trial detention or convicted.³⁶

For all these reasons, we call on the international community and especially the United States to take action and support efforts to defend justice and democracy in the region. It is necessary to protect those civil servants who even in these adverse circumstances continue their work, as well as the independent press and human rights defenders.

The United States should also utilize individual economic sanctions. It cannot permit human rights violations, corruption, and alliances with drug trafficking to remain in impunity both domestically and internationally.

Finally, political and economic support for civil society is absolutely necessary. In these circumstances, they are the voices speaking out against despotism and abuse of power.

³⁴ Impunity Watch. *Judges in High Risk [Courts]: Threats to Judicial Independence in Guatemala*. February 2019. Available at: <https://www.impunitywatch.org/post/jueces-en-mayor-riesgo-amenazas-a-la-independencia-judicial-en-guatemala>.

³⁵ CEJIL et al. *Guatemala: Organizaciones demandamos el cese de la criminalización contra personas funcionarias de justicia y defensoras de derechos humanos*. June 7, 2021. Available at: <https://cejil.org/comunicado-de-prensa/guatemala-organizaciones-demandamos-el-cese-de-la-criminalizacion-contra-personas-funcionarias-de-justicia-y-defensoras-de-derechos-humanos/>

³⁶ AP. *Guatemala: temor por integridad de opositores detenidos*. May 21, 2021. Available at: <https://apnews.com/article/noticias-8e018e4285b4d338228aa2c2f98cdc89>